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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JUL 2 3 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter for a new decision.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a biochemist and biophysicist. The petitioner is currently a postdoctoral associate at [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, a new job offer letter, and citation data.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 11, 2010. In an accompanying statement, the petitioner claimed to be among "key personnel in collaboration between the [redacted] (USA) and the [redacted] (Germany)." The petitioner stated that she had "made significant contribution to studies of biophysics of blood coagulation and photoreceptor biology and **published 10 original research papers and 3 reviews**" (emphasis in original). The petitioner stated that her published work "has received numerous citations in journals in biomedical research." The petitioner also stated:

> [redacted] has one of the best ophthalmic research programs in the United States. . . . My recent work was focused on understanding of molecular mechanisms of vision and light adaptation, particularly G protein signaling in rod photoreceptors. As indicated in reference letters submitted with this petition **my research has significantly increased our current understanding of biology of photoreceptors**.
>
> . . . **[M]y research in visual signal transduction has substantially added to the fundamental understanding of G protein signaling in photoreceptors**.

(Emphasis in original.) The petitioner documented her involvement at various professional conferences, and submitted copies of six articles of which she was the first named author. Regarding the petitioner's claim of "numerous citations" of these articles, the petitioner submitted a printout from a citation database. The printout showed citation figures for six of the petitioner's articles, but did not identify the citing articles.

The petitioner submitted copies of three items with citations to her work, none of them peer-reviewed research articles. Three researchers from [redacted] reviewed one of the petitioner's papers from the [redacted] The review, which appeared in a later issue of the same journal, described "[t]he results of this elegant experiment." The review appeared under the heading [redacted] with an [redacted]' that read, in part: [redacted]

Another issue of the *Journal of Neuroscience* highlighted several new articles, including one by the petitioner, in a section called "[redacted]" Finally, an earlier article by the petitioner is one of 28 cited references in the Wikipedia article [redacted]

Six witness letters (five with digitally reproduced signatures) accompanied the initial filing of the petition. [redacted] where the petitioner earned her various degrees, stated:

> Her project was devoted to the analysis of dynamic modes of blood clotting. The results of her work were remarkable and her productivity was extraordinary. While working in my laboratory, she discovered several new modes of spatial propagation in reaction diffusion systems that had been never described previously for any systems in physics, chemistry, or biology. . . . [S]he also developed a cutting edge numerical mathematical model for simulation of blood clotting under flow conditions and designed [a] new experimental setup which was used to obtain novel results on spatial dynamics of blood clotting under flow condition[s].

[redacted] has supervised the petitioner's postdoctoral training at [redacted] and later at [redacted] Prof.

[redacted] letter, unlike the others submitted with the petition, bears an original signature. Prof. [redacted] described the petitioner's research work in technical detail, and stated that the petitioner's research, published in the [redacted] in 2007,

> has a profound importance for understanding how vision works because it provides a major molecular insight into such . . . 'textbook' questions like: how our visual system operates under conditions of bright ambient illumination and why cones are never blinded by light."
>
> Overall, I am extremely impressed by [the petitioner's] progress and record of achievement and glad to testify that she has become as good an experimentalist as she is a theoretician – a very rare combination of talents. . . . She is currently devoting a major effort to establishing mass-spectrometry methodologies to quantifying lipids present in the ocular tissues. This forward-looking project will empower us with new approaches to understand the basic principle of photoreceptor biology and address many exciting hypotheses related to etiology blinding diseases, including but not limited to retinitis pigmentosa and age-related macular degeneration.

[redacted] called the petitioner [redacted] whose [redacted]

[redacted] has "conduct[ed] several collaborative experiments with [the petitioner] and [redacted] stated:

> Her work is focused on one of the most exciting topics in vision research and experimental ophthalmology: elucidating the molecular mechanisms of visual signal transduction and light adaptation. The main subject of her studies is the molecular mechanism underlying the phenomenon of light-induced changes in the protein distribution in photoreceptor cells, a phenomenon central to the ability of our visual system to adapt to ever-changing conditions of ambient illumination. Her three first authorship publications represent important successive breakthroughs in understanding the mechanisms by which the light-driven translocation and intracellular localization of transducin regulates the sensitivity of the retina's response to light. . . . Together, these publications represent a major step in our understanding of light adaptation on the molecular level, a truly outstanding accomplishment.
>
> These studies will have an immediate impact on our understanding of a variety of retinal disorders. . . . I have no doubt that [the petitioner's] findings are among the most important contributions to the field of vision research and experimental ophthalmology in recent years. Her findings had a tremendous national and international impact. I can assure you that in the near future this work will be taken

up and pursued along numerous avenues by many research teams in the U.S. and worldwide.

[redacted], stated that he and the petitioner "ended up collaborating" on research that led to the 2007 [redacted] article. After describing the petitioner's work in technical detail, [redacted] stated that the petitioner [redacted]

The only initial witness not among the petitioner's mentors or collaborators is [redacted] Prof. [redacted] described the petitioner's work in technical detail, and stated: "With great interest I am waiting for the further development of this project. . . . I conclude that she is one of the most intelligent, creative and technically skilled investigators in her peer group."

On December 23, 2010, the director issued a request for evidence, instructing the petitioner to submit additional documentation regarding the impact of her work and the citation of her published articles. In response, the petitioner submitted evidence showing 85 citations of her published work, including 63 independent citations.

The petitioner also submitted eight more witness letters. Of the eight new witnesses, one is on the [redacted] faculty and four others acknowledged past collaborations with her. [redacted] credited the petitioner with "three *groundbreaking discoveries*" published in papers in 2007, 2009 and 2010 (emphasis in original).

Professor [redacted] is familiar with the petitioner's work "through ongoing collaborations," stated that the petitioner stands out because she "is highly trained in both physics and biology" and is "highly productive," and because "her contributions are conceptual and move the field forward by opening new directions . . . , providing major mechanistic insights into cutting-edge and trendy biological phenomena . . . , and providing mechanistic answers to long-standing unsolved problems in the field."

Dr. [redacted] leads a research group that collaborated with the petitioner and others at [redacted] asserted that the petitioner's "expertise . . . is entirely unique, unlikely shared by any of her peers, and in no way could be considered as a 'routine' set of skills of a biomedical researcher."

[redacted], an associate professor at the [redacted] and the petitioner's self-described "close colleague and collaborator," credited the petitioner as "a key contributor" to

"major progress on the mechanistic explanation for the protein translocation phenomenon." Dr. [redacted] stated that the petitioner's published papers "set the highest standards."

Another self-described "close colleague," Dr. [redacted], worked with the petitioner for several years before accepting an assistant professorship at the [redacted]. Dr. [redacted] credited the petitioner with "seminal advances in the field of vision research."

Professor [redacted] did not mention any collaboration with the petitioner, but claimed to "have followed [the petitioner's] work closely," and credited the petitioner with "major, original contributions" that "greatly exceed the expectations of a postdoctoral researcher, and place her in the category of an independent biomedical research scientist."

Professor [redacted] stated that the petitioner's "papers provided a breakthrough in our understanding of the interactions between subunits of Transducin, a key protein in visual signaling. . . . Her work also explained why we can see in daylight without our cones being blinded by too much light."

Professor [redacted] stated that the petitioner's "findings . . . have formed the basis of our current comprehensive understanding of the regulation of light-triggered transducin transport," and that the petitioner "solved one of the most puzzling problems in photoreceptor biology: why transducin does not translocate in response to light in cone photoreceptors."

The director denied the petition on August 9, 2011. The director acknowledged the intrinsic merit and national scope of the petitioner's work, but found that the witnesses' "letters are general in nature, and do not establish the petitioner's abilities are greater than her peers." Regarding the citation of the petitioner's work, the director stated: "Based on the number of publications, and citations it has not been established the petitioner's work has made a significant impact within their [*sic*] field of study." The director concluded that the petitioner had not shown that her "achievements are . . . unusual or different from other researchers or professors who have had their work[] published, or presented their findings."

On appeal, the petitioner documents her acceptance of an offer for a two-year research scientist position in Prof. [redacted] laboratory from December 27, 2011 to December 26, 2013. The petitioner also submits updated citation figures, showing 97 citations of her work (ten of them self-citations). The submitted data also shows that the *Journal of Neuroscience* is the most-cited journal specializing in neurosciences, and that the petitioner's [redacted] article from is one of the most-cited articles published on the topic of transducin in that journal since [redacted]

In an appellate brief, counsel notes several references to "cancer" and "cancer research" in the director's decision, and asserts that these references are errors of fact because the petitioner is not, and has not claimed to be, a cancer researcher. The director appears to have copied this language from another decision. Its inclusion amounts to harmless error. Elsewhere in the decision (as

counsel acknowledges), the director correctly identified the petitioner's research specialty. Even without those references, there is no indication that the director denied the petition because of a mistaken belief that the petitioner is a cancer researcher.

Counsel also disputes the director's conclusion that "many of the letters were submitted by individuals that personally know the petitioner, and are not from independent sources." Counsel asserts that, of the twelve witnesses, "only five know [the petitioner] personally and have worked closely with her. . . . These include Dr. [redacted], Dr. [redacted], Dr. [redacted], Dr. [redacted], and Dr. [redacted]." Counsel apparently derived these names from a [redacted] that accompanied the appeal, in which the petitioner stated that she "worked closely with" the five people named above, but had little or no contact with seven other named witnesses.

The director did not claim that all or even most of the witnesses have close ties to the petitioner; he said only that "many" of them did. Furthermore, counsel's count of "only five" is demonstrably inaccurate. It omits [redacted], who supervised the petitioner's doctoral studies, and [redacted] who stated that the petitioner worked in his laboratory for nine months. (The petitioner's [redacted] does not mention either of these two witnesses.) Even without factoring in other self-described collaborators who share co-author credit with the petitioner (and thus cannot be expected to be fully disinterested when discussing the importance of the resulting articles), the above discussion shows that half of the witnesses have, in fact, worked closely with the petitioner. The director's general statement about "many" witnesses is, therefore, not an error of fact, as counsel claims on appeal.

More significantly, counsel disputes the director's characterization of the witness letters as being "general in nature." The record supports counsel on this point, as it shows that a number of the letters describe the petitioner's work in fairly fine detail.

Witness letters alone may not provide adequate support for a national interest waiver claim, but the petitioner has not relied on letters alone. The petitioner has submitted evidence of a significant number of citations of her published work, and comparative evidence to show that the citation rate of her work is high in comparison to others performing similar work. The number of citations continues to rise, demonstrating her ongoing influence on her specialty. The director did not give due consideration to this objective evidence of the petitioner's impact on her field.

The evidence of record could support approval of the waiver application, and therefore of the petition. The record, however, lacks a required document. The USCIS regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or corresponding sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not previously raise this issue, either in the request for evidence or in the subsequent denial notice. Because the petition appears to be otherwise approvable, the director must afford the petitioner a reasonable opportunity

to perfect the record by submitting Form ETA-750B or the corresponding sections of its successor form, ETA Form 9089.

Therefore, the AAO will withdraw the director's decision and remand the matter to the director in order to provide the petitioner with the opportunity to provide required evidence that is now missing from the record. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The record, however, does not currently establish that the petition is approvable. The petition is therefore remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.